Chen Kong Theatres Sdn Bhd (in liquidation) & Ors v Lee Giok Tee @ Lee Kim Hong & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(A)-2319–12 OF 2016
ALIZATUL KHAIR, MARY LIM AND ZABARIAH YUSOF JJCA
16 APRIL 2018

Civil Procedure — Service — Failure to serve notice — Non-service of notice of appeal to liquidator in appeal against order of winding up of company — Whether notice of appeal must be served to liquidator of company — Whether appeal defective if notice of appeal not served to liquidator — Companies Act 1965 s 236(2) — Rules of the Court of Appeal 1994 r 6

There were three interlocutory applications within this appeal, namely, encls 5a, 9a and 14a. Vide encl 5a, the appellants sought to consolidate this appeal with Civil Appeal No W-02(IM)(NCC)-2320–12 of 2016. The present appeal was against the order winding up the first appellant while Civil Appeal No W-02(IM)(NCC)-2320–12 of 2016 concerned an interlocutory application for validation payment pending disposal of the winding up petition. Vide encl 9a, the appellants sought for an order that the sanction of the liquidator under s 236(2) of the Companies Act 1965 was not required to file an appeal against the order of winding up the first appellant. If sanction was however required, the appellants sought a further order that the sanction be dispensed with for the purpose of the first appellant's appeal limited only for the purpose as nominal appellant on record. Vide encl 14A, the respondents, supported by the liquidator, sought to strike out the appeal based on the grounds that: (a) the appeal was defective and not properly before the court; (b) there was no sanction from the liquidator before the appeal was filed; and (c) there was no resolution from the board of directors before the appeal was filed.

Held, allowing encl 14a; dismissing encls 5a and 9a:

(1) The present appeal concerned the winding up of the first appellant. Any party who is 'directly affected by the appeal', within the meaning in r 6 of the Rules of the Court of Appeal 1994 ('the Rules'), must be served the notice of appeal. The liquidator was a party 'directly affected by the appeal' within the meaning in r 6 of the Rules and must, therefore, be served with the notice of appeal. The appellant admitted that the notice of appeal was not served on the liquidator. In fact, to date, none has been served. There were no applications to extend and/or abridge time for service of the notice of appeal or even the record of appeal. Since there

A was no such application, despite the appellants being aware of the non-service of the notice of appeal, the appeal was defective and the appropriate order was to strike out the appeal (see paras 13–14 & 17–18).

[Bahasa Malaysia summary

B Terdapat tiga permohonan interlokutori, iaitu lampiran 5a, 9a dan 14a. Melalui lampiran 5a, perayu cuba menggabungkan rayuan ini dengan Rayuan Sivil No W-02(IM)(NCC)-2320–12 Tahun 2016. Rayuan ini adalah terhadap perintah menggulung perayu pertama manakala Rayuan Sivil No W-02(IM)(NCC)-2320–12 Tahun 2016 adalah berkenaan dengan C permohonan interlokutori untuk pengesahan bayaran sementara menunggu pelupusan petisyen penggulungan. Melalui lampiran 9a, perayu memohon perintah bahawa kebenaran pelikuidasi bawah s 236(2) Akta Syarikat 1965 tidak diperlukan untuk memfailkan rayuan terhadap perintah penggulungan D perayu pertama. Sekiranya kebenaran diperlukan, perayu memohon perintah selanjutnya agar kebenaran tidak diperlukan kerana rayuan perayu pertama hanya terhad bagi tujuan perayu nominal yang direkodkan. Melalui lampiran 14A, responden, yang disokong oleh pelikuidasi, memohon membatalkan rayuan berdasarkan alasan bahawa: (a) rayuan yang dibuat di E mahkamah cacat dan tidak teratur; (b) tidak ada kebenaran daripada pelikuidasi sebelum rayuan difailkan; dan (c) tidak ada resolusi oleh lembaga pengarah sebelum rayuan difailkan.

Diputuskan, membenarkan lampiran 14a; menolak lampiran 5a dan 9a:

F (1) Rayuan ini berkenaan dengan penggulungan perayu pertama. Mana-mana pihak yang 'terjejas secara langsung oleh rayuan' bawah maksud k 6 Kaedah-Kaedah Mahkamah Rayuan 1994 ('Kaedah-Kaedah') mesti diserahkan notis rayuan. Pelikuidasi adalah G pihak yang 'terjejas secara langsung oleh rayuan' dalam makna k 6 Kaedah-Kaedah dan oleh itu, hendaklah diserahkan dengan notis rayuan. Perayu mengakui bahawa notis rayuan tidak diserahkan kepada pelikuidasi. Malah hingga kini tidak ada notis rayuan yang diserahkan. Tidak ada permohonan untuk memperluaskan dan/atau H mememanjangkan masa untuk menyerahkan notis rayuan atau rekod rayuan. Memandangkan tidak ada permohonan sedemikian, walaupun perayu-perayu menyedari tidak adanya notis rayuan, rayuan cacat dan perintah yang sesuai adalah untuk membatalkan rayuan (lihat perenggan 13–14 & 17–18).]

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Notes

For a case on failure to serve notice, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) para 8608.

Cases referred to

Brinds Ltd & Ors v Offshore Oil NL & Ors (No 2) (1985) 10 ACLR 242, SC (refd)
Gurbachan Singh v Seagrott & Campbell (No 2) [1962] 1 MLJ 370, CA (refd)
Hock Seng Construction Sdn Bhd & Anor v Yong Kon Fatt & Anor [2001] 3 MLJ 499, CA (refd)
Majlis Perbadanan Kangar v Sonati Development Corp Sdn Bhd [2007] 1 MLJ 133, CA (refd)
Re Union Accident Insurance Co Ltd [1972] 1 All ER 1105, Ch D (refd)
Soh Keng Hian v American International Assurance Co Ltd [1996] 1 MLJ 191, CA (refd)
Sri Hartamas Development Sdn Bhd v MBf Finance Bhd [1991] 3 MLJ 325, SC (refd)

Legislation referred to

Companies Act 1965 s 236(2)
Rules of the Court of Appeal 1994 rr 6, 18(7), (9)

Appeal from: Companies (Winding-Up) Petition No WA28NCC-552–07 of 2016 (High Court, Kuala Lumpur)

Wallace Wong (Jerry Ling Young Tuen with him) (Lee, Ling & Partners) for the appellants.
Eugene Choong Kuok Yuen (PC Chong & Co) for the respondents.

Mary Lim JCA (delivering judgment of the court):

[1] There were three interlocutory applications before us, namely encls 5a, 9a and 14a, each with their respective affidavits in support.

[2] Vide encl 5a, the appellants in this appeal seek to consolidate this appeal with Civil Appeal No W-02(IM)(NCC)-2320–12 of 2016. The present appeal is against the order winding up the first appellant while Civil Appeal No W-02(IM)(NCC)-2320–12 of 2016 concerns an interlocutory application for validation payment pending disposal of the winding up petition.

[3] Vide encl 9a, the appellants are seeking for an order that the sanction of the liquidator under s 236(2) of the Companies Act 1965 is not required to file an appeal against the order of winding up the first appellant. If sanction is however required, the appellants seek a further order that the sanction be dispensed with for the purpose of the first appellant's appeal limited only for the purpose as nominal appellant on record. Alternatively, the second and third appellants are seeking leave to file and/or prosecute the appeal for and on behalf of the first appellant for the limited purpose as nominal appellant on record

A only in the notice of appeal dated 15 December 2016. These appellants are also seeking that any leave granted be with retrospective effect from the date of the notice of appeal.

B **[4]** Finally, there is encl 14a. This application is made by the respondents and it is supported by the liquidator. It is an application to strike out the appeal.

[5] After considering the intent of each of those applications, we decided that it was only appropriate that the court deal with encl 14a first.

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[6] By way of encl 14a, the respondents sought to strike out the present appeal with costs on three grounds:

(a) that the appeal is defective and not properly before the court;

D (b) there is no sanction from the liquidator before the appeal was filed; and

(c) there was no resolution from the board of directors before the appeal was filed.

E **[7]** In the affidavit filed in support of the application, the respondents claimed that the appeal is defective and not properly before the court because the notice of appeal was never served on the liquidator of the first appellant. An exchange of correspondence between the solicitors of the respective parties confirming the position of non-service on the liquidator was offered in evidence. The respondents contended that the liquidator, being an interested F party, must be served with the notice of appeal. It was not. Instead, only the record of appeal was served and even then, it was served nearly two months out of time.

G **[8]** The respondents further contended that the second and third appellants have failed to obtain sanction from the liquidator before filing this appeal on the first appellant's behalf. According to the respondents, because the first appellant was wound up by reason of the unlawful conduct of the second and third appellants which had adversely affected the interests of the first appellant's H shareholders, sanction from the liquidator to file an appeal is necessary.

[9] Yet another reason was a claim that the board of directors of the first appellant had not resolved to file this appeal. Consequently, the second and third appellants have no locus to file the appeal and are said to be acting out of I authority, residual or otherwise, to unilaterally decide matters on behalf of the board of directors. The board comprises five directors and the second and third appellants are only two of five of them.

[10] The appellants did not file any affidavits in response to this application.

Learned counsel for the liquidator confirmed that there was non-service of the notice of appeal and that the record of appeal was served late. In fact, an affidavit in reply was filed to this effect by the liquidator.

[11] This appeal turns on the interpretation and application of the Rules of the Court of Appeal 1994, in particular rr 6, 18(7) and 18(9) which provide as follows:

> 6 Service of notice of appeal
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> Notice of appeal *shall be served on all parties directly affected* by the appeal or their solicitors respectively within the time limited for the filing of the notice of appeal. It shall not be necessary to serve parties not so affected.
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> 18 Memorandum of appeal
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> (7) The memorandum and copies above referred to which, together shall be called the record of appeal, *shall be filed* at the Registry *within eight weeks* after the entry of the appeal.
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> (7A) Notwithstanding subrule (7), if any copy of the documents specified in paragraph (4)(b), (d) or (e) is not available within eight weeks after the entry of the appeal, the appellant shall file the copy of the documents together with the memorandum of appeal as supplementary records of appeal within three weeks of being notified of its availability.
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> (8) Sufficient copies of the record of appeal for the use of the Judges of the Court shall be sent to the Registrar when the record of appeal is filed.
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> (9) The appellant *shall within the time limited for the filing of the record serve* a copy thereof on each party who has been served within the notice of appeal. (Emphasis added.)

[12] The decision of the High Court that is appealed against was made on 17 November 2016. The last day for entry of the notice of appeal would be 17 December 2016.

[13] The three appellants filed a notice of appeal on 15 December 2016. The appellants admit that the notice of appeal was not served on the liquidator. In fact, till to date, none has been served. Only the record of appeal was served on the liquidator and that was on 30 March 2017 while the last date for its service was on 17 February 2017. There are no applications to extend and/or abridge time for service of the notice of appeal or even the record of appeal.

[14] It is trite that any party who is 'directly affected by the appeal' within the meaning in r 6 must be served the notice of appeal. Rule 6 is mandatory in its terms the failure of which renders the appeal incompetent. Although the Court of Appeal in *Majlis Perbadanan Kangar v Sonati Development Corp Sdn Bhd* [2007] 1 MLJ 133 following the earlier Court of Appeal decisions in *Soh Keng*

Hian v American International Assurance Co Ltd [1996] 1 MLJ 191 and *Gurbachan Singh v Seagrott & Campbell (No 2)* [1962] 1 MLJ 370 held that an appeal which was not served at the time of appeal is not incompetent but irregular, and that it was open to the court to deal with the irregularity in such manner and upon such terms as this court 'shall think fit', it may only do so upon application by the appellants. In such applications, reasons must be offered. Since there are no such applications before us, despite the appellants being aware of the non-service of the notice of appeal, we are constrained to agree with the respondent and the counsel acting for the liquidator that the appropriate order is to strike out the appeal.

[15] The position is somewhat compounded by the late service of the record of appeal, a service which has not been regularised by the appellants who adamantly stand by their position that the liquidator is not a party who must be served under r 6. In the case of *Hock Seng Construction Sdn Bhd & Anor v Yong Kon Fatt & Anor* [2001] 3 MLJ 499, the Court of Appeal had proceeded to strike out an appeal where the record of appeal was served out of time.

[16] From the submissions of learned counsel for the appellants, the non-service of the notice of appeal on the liquidator was because the appellants perceived the liquidator as a neutral party. The subsequent service of the record of appeal was only in response to a request by the liquidator.

[17] The question then is whether the liquidator is a party 'directly affected by the appeal' within the meaning in r 6. If the answer is in the negative, r 6 itself provides that it is not necessary to serve a person who is not so affected.

[18] In our view, the liquidator is undoubtedly a party directly affected by the appeal. The present appeal concerns the winding up of the first appellant. Although the Supreme Court in *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1991] 3 MLJ 325 was of the view that the company that is the subject of the winding up order has a right to be heard and to appeal against the order, the Supreme Court recognised that upon a company being wound up, it is the liquidator who acts on behalf of the company.

[19] On a practical note, the outcome of the appeal in respect of the winding up order itself is obviously and logically of interest to the liquidator. If allowed, the liquidator's appointment will have to be set aside as a necessary consequence. We do not see how, given those circumstances the liquidator may be said to be a party who is not directly affected by the appeal. The liquidator certainly falls within the category of parties directly affected by the appeal. That being so, the liquidator must be served. The language in r 6 is couched in mandatory terms and since there is failure to comply with this rule, the appeal is defective.

[20] We must add that the extent that the liquidator chooses to involve itself in the appeal is an entirely different question from the issue under consideration; the answer to which in our view does not alter or affect our reading of r 6. It is mandatory that the liquidator, as a party directly affected by the appeal, be served. In fact, the liquidator had asked to be served, and where it makes that request, it must be served. Since it was only served with the record of appeal and not the notice of appeal, we agree with the respondents and the liquidator that the appeal is defective and liable to be struck out.

[21] Given that there is no application before us to remedy that position, including one to extend time for service, we cannot see how the present appeal can remain in the list as a competent appeal. We also note that the other two applications filed by the appellants do not attend to these concerns at all. The appellants chose instead to stand by their assertion that the liquidator is not a party within the meaning of r 6; and therefore need not be served. With respect, we disagree and we have already set out our reasons.

[22] In *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd*, the Supreme Court had observed that it was, inter alia, held in *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105, 'that notwithstanding the appointment of the provisional liquidator and the general resumption of the company's powers, the board still retained certain residuary powers, which included the authority to instruct solicitors and counsel to oppose the petition and, if a winding up order is made, to appeal against the order. In that case, it was also held that the power to instruct solicitors and counsel is not the power which any one could suggest has passed to the provisional liquidator'. The Supreme Court was prepared to follow this decision as it was also followed by the Supreme Court of Victoria, Australia in the case of *Brinds Ltd & Ors v Offshore Oil NL & Ors (No 2)* (1985) 10 ACLR 242. The Companies Act 1965 of Malaysia adopted the equivalent Australian legislation.

[23] Although in the present appeal, the liquidator appointed is not a provisional liquidator, we find the authority equally persuasive. In any event, even if the first appellant had residuary powers, there is no evidence to show that the board of directors had authorised the filing of the appeal. The notice of appeal was therefore, filed with want of authority.

[24] For all the reasons set out above, we were much constrained to agree with the respondents and the liquidator and allow the application in encl 14a. This appeal is therefore struck out with costs to the respondents. With the striking out of the appeal, consequentially, encls 5a and 9a must also stand dismissed with costs.

A *Enclosure 14a allowed; encls 5a and 9a dismissed.*

Reported by Afiq Mohamad Noor

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